Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,

Petitioner

vs.

INDIANA REFRIGERATOR LINES, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1975.

NO. ____

JAMES DALTON,

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vs.

INDIANA REFRIGERATOR LINES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, James Dalton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 12, 1975.

OPINIONS BELOW

The Opinion of the Court of Appeals is not reported and appears in the Appendix hereto. The Opinion by the District Court for the Middle District of Tennessee was not reported and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 12, 1975. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an indemnity provision in a trip-lease agreement, by which a supplier of equipment and driver agrees to indemnify an interstate motor vehicle carrier, is unenforceable as against public policy established by 49 U.S.C. §304(e) and 49 C.F.R. §1057.4(a)(4).

2. Whether such indemnity agreement is too vague and ambiguous to apply to the facts of this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 28:

§304(e). Regulations governing use of vehicles owned by others.

"Subject to the provisions of Subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor vehicle carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they

were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

Code of Federal Regulations, Title 49:

§1057.4(a). Augmenting equipment.

"Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease or other arrangement for the use of such equipment: . .

(4) Exclusive possession and responsibilities.
Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . ."

STATEMENT OF THE CASE

The facts in this case are essentially undisputed. James Dalton, the Petitioner, supplied equipment and a driver to Indiana Refrigerator Lines, Inc., the Respondent, a major common carrier regulated by the Interstate Commerce Commission. The parties executed a lease agreement for a single shipment. (Record, p. 21). The cargo was stolen by the driver en route (Record, p. 9) and Indiana brought suit to recover losses it had suffered under an indemnification provision in the lease agreement.

Dalton, on the date of the shipment in question, owned five tractor-trailer units in which he hauled agricultural commodities exempt from Interstate Commerce Commission Regulation. (Record, p. 94). On return trips, Dalton's drivers leased their equipment and themselves to common carriers regulated by the Interstate Commerce Commission in order to haul non-exempt cargo for a single trip under a common carriers' certificate of convenience. (Record, p. 118).

The lease which is the subject matter of this suit was executed on July 28, 1972, by James Elmore, a truck driver for Dalton, acting as agent for Dalton. Under the lease, Elmore was to haul non-exempt cargo consisting of pork loins from Illinois to Maryland. (Record, p. 21). The driver stole the

cargo while en route, driving under Indiana's Interstate Commerce Commission permit and signs. (Record, pp. 9, 124). The leased vehicle was recovered on August 4, 1972, and a part of the cargo was also located, thus reducing Indiana's loss. (Record, pp. 34, 59).

Indiana paid the shipper, Campbell Soup Company, on its bill of lading. (Record, p. 57). Indiana brought suit to recover the amount of its loss under the indemnity provision of the trip-lease agreement. This provision reads as follows:

> "Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including the Lessee's Assumption of full direction, control and responsibility for said equipment for the duration of this agreement. Nevertheless, as between the Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement." (Record, p.22)

Indiana, after paying the shipper, brought suit against Dalton, a resident of Tennessee, in the District Court for the Middle District of Tennessee for Twenty-five thousand one-hundred thirty-six and 87/100 Dollars ($25,136.87). Indiana is a corporation organized under

the laws of the State of Indiana, with its principal place of business at Muncie, Indiana. The District Court dismissed Indiana's suit on June 19, 1974. The District Court found that Dalton was not negligent under the facts of the case. Thus there was no basis for indemnity at common law, absent and enforceable contract provision. The District Court then found the Indemnity Agreement in the parties' trip-lease agreement was unenforceable. (See p. 5a of Appendix hereto.)

The Order of Dismissal was reversed by the Sixth Circuit Court of Appeals on May 12, 1975. (See p. 1a of Appendix hereto.) A judgment against Dalton was entered by the District Court for the Middle District of Tennessee on July 18, 1975 in the amount of $25,436.87.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS BELOW UNDERMINDS THE POLICY OF THE REGULATIONS PROMULGATED BY THE INTERSTATE COMMERCE COMMISSION FOR THE LEASING OF EQUIPMENT BY AUTHORIZED CARRIERS.

A. <u>The Trip-Leasing Regulations</u>

The question involved in this case, whether the indemnity provision in the parties' trip-lease agreement is enforceable involves the interpretation and construction of Interstate Commerce Commission Regulation 207.4(a)(4), 49 C.F.R. 1057.4(a)(4), one of a series

of regulations promulgated in Lease and Interchange of Vehicles by Motor Carriers. Ex Parte No. MC-43, 52 M.C.C. 675 (1951). Under these regulations the Interstate Commerce Commission established rules governing the use of non-owned equipment by authorized motor carriers. The regulations were promulgated to protect the trucking industry from leasing and interchange practices which were detrimental to the maintenance of sound transportation services. Central to the regulatory scheme was Regulation 207.4(a)(4) which provided that whenever an authorized motor carrier shall lease unauthorized equipment, the lease agreement shall be in writing and,

> "shall provide for the exclusive possession, control and use of equipment for the complete assumption of responsibilities in respect thereto by the Lessee for the duration of said contract, lease or other arrangement. . ." 49 C.F.R. §1057.4(a)(4). (emphasis supplied)

It is the position of the Petitioner that the clear meaning of this provision is that the authorized motor carrier is required by the Interstate Commerce Commission to assume all of the burdens of transportation while the leased equipment is used under its permit, including the financial risks of loss for that equipment, driver, cargo and potential injury to third parties. The position of the Respondent and that of the

Court of Appeal below is that as long as the lease agreement recites the above-quoted language, there is no inconsistency in allowing the regulated carrier to provide for indemnification by the non-regulated supplier of the equipment.

B. The Policy Behind the Regulations-American Trucking Associations vs. United States

The decision of the Court below subverts the purpose for which the Interstate Commerce Commission leasing regulations were promulgated. These regulations were promulgated on May 8, 1951 after a three-year study. Ex Parte No. MC-43, 52 M.C.C. 675 (1951). The regulations were upheld by this Court in the case of American Trucking Associations vs. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1952). In that case this Court found, in the face of an attack by a number of motor carriers and associations, that the regulations were valid and in the public interest. The practices of leasing and interchanges had led to abuses which "directly affect[ed] the regulatory scheme of the Act, the public interest in necessary service and economic stability of the industry, and

it is on these that the rules focus." (p. 304) This Court thus held that the Commission acted within its power in promulgating the rules and that there was "clear and adequate evidence of evils attendant on trip-leasing". (p. 310) The leasing of equipment gave rise to a number of problems which were found to be detrimental to the industry. Thus leasing and interchange practices permitted: (1) evasion of the limitations of certified authority, geographical and otherwise, (2) decreased impetus and opportunity for safety inspections to be made by the certified carriers, and (3) difficulties in determining responsibility for accidents. In addition, the leasing practice had an adverse effect on the economic stability of the industry. Rate regulation was obstructed as overhead costs were unequal between authorized carriers who leased vehicles and those that did not, the difference in overhead costs forcing companies which owned vehicles to revert to leasing practices in order to compete with those that did. Ibid. (pp. 304-306.)

The decision of the Court of Appeals below leaves the door open for the revitalization of the above-listed evil practices. If an authorized carrier need not be concerned with a risk of loss in the use of unauthorized equipment, there is no impetus to thoroughly inspect equipment for safety. Legal responsibility for

accidents once again is shifted away from the Interstate Commerce Commission regulated carriers, whose signs are placed upon the vehicle, to a party who may not be known to the injured party and who may not be adequately insured (authorized carriers are required by the Interstate Commerce Commission to carry full insurance. 49 U.S.C.A. § 315). Finally, the economic stability of the industry is affected as carriers using leased vehicles need not pay liability insurance on such vehicles, thereby decreasing overhead, providing such companies with an unfair advantage over authorized carriers using owned vehicles.

C. Subsequent Congressional Action.

The strong public interest behind the promulgation and enforcement of the statutes was reinforced in 1956 when Congress amended §304 of Title 49. S. 898, 70 Stat. 983. The amendment to §304(e) authorized the Interstate Commerce Commission to prescribe, with respect to the use by motor carriers of motor vehicles not owned by them, regulations, which:

> "may be reasonably necessary to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations as if they were the owner of such vehicles." (emphasis supplied)

The Congressional mandate thus now directs the Interstate Commerce Commission to require that the authorized carriers assume full control and responsibility for regulated interstate shipments. The carrier cannot delegate to another party its duties to bear costs resulting from interstate shipments without delegating a part of its duty and responsibility of full control. The duties of full control and costs bearing are inseparable under the Act and Regulations. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773 (Seventh Circuit, May 6, 1974), Petition for cert. granted, 43 U.S.L.W. 3493 (No. 74-54).

Thus, the decision of the Court below in allowing an indemnity provision in a lease agreement which specifies that the motor carrier lessee must assume "full direction, control and responsibility" (Record, p. 22) for the leased equipment renders the regulatory provisions for the express assumption of exclusive control by the motor carrier a mere formality.

D. The Agricultural Exemption to the Trip-Leasing Regulations

The decision of the Court below also subverts a well-recognized exemption to 30-day leasing regulations which apply to haulers of agricultural commodities. 49 C.F.R. §1057.4(a)(3)(i). The Interstate Commerce Commission found on a subsequent study of its regulations that farmers frequently haul their own produce to markets and rely on trip-leasing from authorized carriers to make a small profit on their return trip. Lease and Interchange by Motor Carriers, Ex Parte No. MC-43, 64 M.C.C. 361 (1955),

68 M.C.C. 553 (1956). The Interstate Commerce Commission found that this single trip leasing practice would be beneficial to the agricultural industry and therefore exempted such haulers from the regulatory provisions that trip-leases with carriers must be at least thirty days in length as long as trip-leases between the authorized carriers and agricultural haulers were for a single trip only. Ibid. This exemption was codified in an amendment to §49 U.S.C. 304(f), passed by Congress in 1956, S. 898,. 70 Stat. 983. This exemption is in line with the general exemption of agricultural commodities from Interstate Commerce Commission regulation. 49 U.S.C.§303(b)(6).

Dalton's operation complied with the exemption for agricultural commodities and his drivers frequently operated under single trip-lease agreements. The decision of the Court below, which has the effect of requiring small exempt agricultural haulers such as Dalton to bear liability insurance costs on regulated trip-lease shipments presents an undue burden on these agricultural haulers. Such haulers would be required under this decision to insure themselves for twice as many shipments and to insure themselves for trip-lease shipments of cargo of uncertain value. This increased cost would obviously have an adverse effect on these haulers and, indirectly, the agricultural industry itself. Thus, the decision of the Court below undermines a valid exemption promulgated to advance the agricultural industry.

2. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND STATE COURTS AS TO THE QUESTION OF WHETHER SUCH INDEMNITY PROVISIONS ARE UNENFORCEABLE DUE TO THEIR VIOLATION OF THE PUBLIC POLICY ESTABLISHED BY THE INTERSTATE COMMISSION.

A. The Fifth and Sixth Circuits Hold the Indemnity Provisions Enforceable

The decision of the Court below follows the recently decided case of Jones Truck Lines, Inc. vs. Ryder Truck Lines, 507 F.2d 100 (6th Cir., 1974) pet. for cert. filed 43 U.S.L.W. 3479 (Feb. 6, 1975) (No. 74-973), in which the Sixth Circuit held valid an indemnification clause which required a lessor of equipment to indemnify an Interstate Commerce Commission regulated carrier from losses occurring during the performance of the lease agreement. See also Indiana Insurance Co. vs. Parr Trucking Service, Inc., 510 F.2d 490 (6th Cir.,1975). This case follows an earlier decision by the Fifth Circuit. Allstate Insurance Company vs. Alterman Transport Lines, 465 F.2d 710 (5th Cir., 1972). (The Jones Truck Lines decision was not reported at the time the parties to this case argued before the Sixth Circuit.)

In the Allstate case, the Fifth Circuit upheld an indemnity clause in a lease between two regulated carriers. Whether the Fifth Circuit would follow its decision in Allstate if faced with the same issues is now subject to question. In a later case, Simmons vs. King, 478 F.2d 857 (5th Cir. 1973) that Circuit emphasized the public policy of the Interstate Commerce Commission regulations in requiring the carrier-lessee to assume full and complete responsibility for the

negligence of a driver while operating under a trip-lease agreement. Although the lease agreement in Simmons did not involve an indemnification provision, the Court did reaffirm the strong public policy behind the regulations, thereby throwing into question the Allstate decision which had the effect of weakening the regulations and the public policy behind them.

B. The Seventh Circuit Holds the Indemnity Provisions Unenforceable

However, there is a clear split of authority between the Court of Appeals on this issue. In a decision which adopts the position the Petitioner here asserts, the Seventh Circuit, in the case of Alford vs. Major, 470 F.2d 132 (7th Cir. 1972) declared a similar indemnity provision unenforceable. In that case the carrier-lessee and the lessor both were sued by a third party for negligence of the driver, and the carrier-lessee then filed a cross-claim against the lessor for indemnification. Quoting from the American Trucking Associations case, the Seventh Circuit found,

> "The purpose of the regulations thus was 'to protect the industry from practices detrimental to the maintenance of sound transportation services. . .' and to assure safety of operation for vehicles and drivers." (p. 34).

Further, the Court found that the intent of the regulation was "to make sure that licensed carriers would be responsible in fact as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers." (p.135). Thus, the Seventh Circuit held that the purpose and intent of regulations would be defeated by an indemnification clause which would permit the carrier-lessee to "circumvent the regulation's requirement that these carriers exert actual control over the leased equipment and all drivers". (p.135). This case was upheld recently by the Seventh Circuit in an unreported case. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773. (7th Cir. May 6, 1974) pet. for cert. granted, 43 U.S.L.W. 3493 (No. 74-54).

C. The Fourth Circuit Holds With the Fifth and Sixth Circuits

On the other hand, in a recent decision, the Fourth Circuit followed Allstate and attempted to distinguish Alford. Carolina Freight Carriers Corp. vs. Pitt County, 492 F.2d 243 (4th Cir. 1973). pet. for cert. filed 43 U.S.L.W. 3067 (August 13, 1974) No. 73-1750). The Fourth Circuit found that Alford was not persuasive on the grounds that the carrier-lessee in Alford violated other provisions of the ICC Regulations in addition to providing for indemnity. The Fifth Circuit held that two "freely contracting parties" may determine between themselves which party will ultimately bear the costs and damages done to a third person.

The attempt to distinguish Alford on its facts is unsound. The Seventh Circuit recently had occasion to address itself again to the issue of whether an indemnity provision in a trip-lease agreement is unenforceable, and reaffirmed its decision in Alford. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974), pet. for cert. granted, 43 U.S.L.W. 3493 (No. 74-54). The Seventh Circuit rejected the factual distinction adopted by the cases following Allstate,

> "We do not agree that Alford can be distinguished from [Allstate]. The Fifth Circuit determined that 49 C.F.R. §1057.4(a)(4) did not prohibit the parties from determining between themselves which parties would bear the costs. The district court in Alford expressly rejected this interpretation. . .and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations." (p.7).

Thus, the Seventh Circuit held in Wear, that under the statute and regulations, the duty of bearing costs for damages occurring in transit is inseparable from the carrier's duty of responsibility and control,

> "[The carrier-lessees] argument proceeds from the premise that control and cost bearing are not related. We disagree. In Alford we interpreted the regulations as requiring the party who had the

duty of responsibility and control under 49 U.S.C. §304(e) to internalize the cost of any breach of this duty. This forces the lessee to take costs into account in the exercise of such duty." (p.7).

D. Nebraska and New Jersey State Courts Hold With the Seventh Circuits

Two State Supreme Courts, Nebraska and New Jersey, have recently faced the question presented here, whether an indemnification clause in a trip-lease agreement is enforceable. Both State Courts noted the split of authority between Alford and Allstate and followed the holding of Alford. Thus, the Nebraska Supreme Court in the case of Denver Midwest Motor Freight, Inc. vs. Busboom Truck Lines, Inc., 190 Neb. 231 207 N.W. 2d 368 (1973) held,

> "[A]n indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC Regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy." (p.371)

More recently, in the case of Gordon Leasing Co. vs. Navajo Freight Lines, 130 N.J. Super. 290,326 A.2d 114 (1974), the Supreme Court of New Jersey held an indemnification agreement in a lease between two carriers to be unenforceable.

> "The enforcement of the indemnity provision as sought by the lessee could result in adversely affecting the safety of the operation of the equipment, would permit circumvention of the requirements of the ICC pertaining to truck leasing, and inject uncertainties in the responsibilities of lessor and lessee with respect to the use of leased equipment. Public policy was better served by mandating compliance with the regulations." (p. 118)

E. Conclusions

Thus, there are at least seven cases decided on the issue presented in the instant case. Four, Alford, Wear, Denver Midwest Motor Freight, and Gordon Leasing Co., hold that an indemnification provision in a trip-lease agreement is unenforceable (in addition, it is appropriate to remember that the District Court in this case held the indemnity clause unenforceable). Three cases, Allstate, Carolina Freight Carriers and Jones Truck Lines, Inc., take the opposite position. Of these cases above cited, the following cases are pending before this Court: Wear (Certiorari granted), Carolina Freight Carriers (Certiorari filed) and Jones Truck Lines, Inc. (Certiorari filed). A decision on any of these cases which is dispositive of the principal issues involved in this case should therefore be applicable to this case.

Although the instant case involves a theft by a driver supplied by the lessor, the issue presented in the instant case is the same as the above-cited cases, which all involve suits arising from the negligence of the drivers supplied by the lessors. The Respondent pleaded a "negligent entrustment" theory before the trial court, i.e. that Dalton had negligently failed to investigate his driver before hiring him. However, the findings of fact by the District Court that "Indiana has failed to show any discoverable aspect of Elmore's past to cast doubt on his trustworthiness" (See p. 11a of Appendix hereto) precluded this issue. In the absence of the lessor's negligence, there is no distinction that the above-cited cases involve driver negligence as opposed to driver dishonesty.

The issues presented in this case are of paramount importance to a large national industry. The split of authority of the cases results in an uncertainty within the industry. Both authorized carriers who utilize leasing practices and the suppliers of equipment cannot ascertain which party is to bear the risk of loss during shipment. The result of the present situation is economic waste: Both parties must insure themselves for liability under a trip-lease agreement. The only solution to this uncertainty is for this Court to grant this Petition for a Writ of Certiorari and decide the issues in this case as well as the three other cases involving this issue in which certiorari is presently pending.

F. Other Issues Involved

Finally, the correctness of the proceeding below, even assuming that the indemnity provisions are enforceable, is open to serious question. The indemnity provision in the trip-lease agreement in this case is extremely short and vague,

> "Nevertheless, as between the Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless the Lessee from any and all claims of whatever kind or nature that may arise under this agreement." (Record,p. 22).

The driver of the leased vehicle is Indiana's "statutory employee" under the aforementioned Interstate Commerce Commission Regulations. Simmons vs. King, 478 F.2d, 857 (5th Cir. 1973). To the extent that the indemnity provision covers the negligence or intentional wrongdoing of its own employees, the indemnity provision must be strictly interpreted and narrowly applied under State law. Thus, where the indemnitee claims indemnity against his own negligence, the courts will require "clear and unambiguous language". Eades vs. Union Railway Co., 396 F.2d 798 (6th Cir. 1968); Brogden vs. Southern Railway Co., 284 F.2d 220 (E.D.Tenn. 1967).

Properly interpreted, the second sentence of the indemnity provision, in referring to liability arising out of "this agreement" is limited to liability under the lease agreement. The word "this agreement" in the indemnity provision should not be extended to cover liabilities arising out of the shipping agreement, i.e.

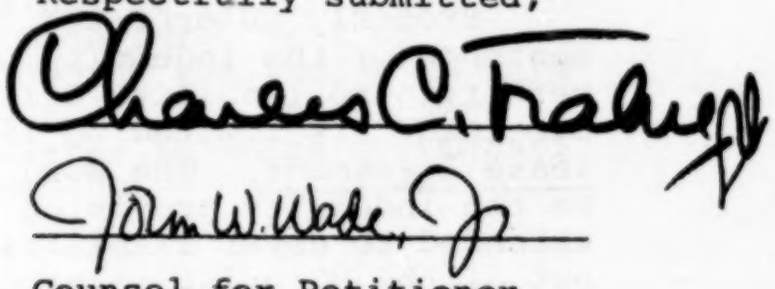
the bill of lading, which is an agreement completely extraneous to the lease agreement and of course is not executed by the lessor. Yet the decision of the Court below imposes on the Petitioner liability for loss on the Respondent's shipping contract. Finally, it is important to note that the lease agreement is a standard form contract prepared by the Respondent without negotiations with Dalton. Thus the words of the contract should be interpreted narrowly against the Respondent. Restatement, Contracts §236(d).

Thus, this Court need not adopt the broad construction of the indemnity provision found by the Court of Appeals below. This case could indeed end with the decision that the indemnification provision in the trip-lease agreement is not judicially construed to extend to the extreme position which the Sixth Circuit has adopted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



Counsel for Petitioner

August 1, 1975

APPENDICES

No. 74-2197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Indiana Refrigerator Lines, Inc.,	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Middle District of Tennessee.
v.	)	
James Dalton,	)	
Defendant-Appellee.	)	

Decided and Filed May 12, 1975.

Before: Phillips, Chief Judge, Peck, and McCree, Circuit Judges.

Per Curiam. This is an appeal from the dismissal of a complaint in an action for indemnification brought by Indiana Refrigerator Lines, Inc. against Dalton for damages arising from a Dalton employee's conversion of cargo from a truck that Dalton had leased to Indiana. In its complaint, Indiana alleged that Dalton was required to indemnify it for the damages it had paid to the shipper of the lost cargo because of an indemnity clause in the trip-lease agreement between them:

"Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's Assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement."

The district court, relying on the language of 49 C.F.R. §1057.4(a)(4)[1] dismissed Indiana's complaint on the ground that Indiana, as an I.C.C. certified carrier, is required to assume ultimate responsibility for any damages arising from the execution of a trip-lease agreement with an exempt carrier, and that to permit an action for indemnification against a lessor who is exempt from I.C.C. regulation would undermine the public policy expressed in 49 C.F.R. §1057.4(a)(4). In making this determination, the district court expressly declined to follow the

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[1]In accordance with the authority given to it by Congress in 49 U.S.C. §304(e), the Interstate Commerce Commission promulgated 49 C.F.R. §1057.4(a)(4) that required, inter alia, that trip lease agreements "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ."

decision in Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972) and followed the decisions in Alford V. Major, 470, F.2d 132 (7th Cir. 1972) and in Carolina Freight Carriers Corp. v. Pitt County Transportation Co., 358 F.Supp. 1177 (E.D. Va. 1973), rev'd 492 F.2d 243 (4th Cir. 1974),petition for certiorari pending, No. 73-1750, 43 U.S.L.W. 3041, (August 13, 1974).

Since the district court's decision, the Supreme Court has granted certiorari in Wear v. Brada Miller Freight Systems, Inc., No. 74-54, 43 U.S.L.W. 3493 (March 18, 1975), a case in which the Seventh Circuit, in an unreported order, followed its earlier decision in Alford and held invalid an indemnification clause similar to the one at issue in this case. More importantly, the district court in the appeal before us did not have available to it at the time of its decision our recent opinions in Jones Truck Lines, Inc. v. Ryder Truck Lines, No. 74-1443 (December 13, 1974), petition for certiorari pending, No. 74-973, 43 U.S.L.W. 3479 (March 4, 1975) and Indiana Insurance Co. v. Parr Trucking Service, Inc., No. 74-1652 (February 11, 1975) in which we upheld the validity of indemnification clauses in trip-lease agreements requiring a carrier who is exempt from I.C.C. regulation to indemnify an I.C.C. regulated carrier for losses occurring during the performance of the lease agreement. On the authority of these decisions, we reverse the determination of the district court and remand for further proceedings.

In making this disposition, we observe that there is no doubt that Indiana was required by I.C.C. regulations to pay the shipper for the loss of cargo. Indiana has done this. Accordingly, the only question before us is whether the policy expressed in the regulatory requirement prohibits an action for indemnification against the lessor of the vehicle when the driver furnished by the lessor converts the cargo for his own purposes. We agree with appellant that the primary goals of the I.C.C. regulation imposing responsibility on carriers are: (1) to prevent I.C.C. carriers from avoiding safety standards imposed by the I.C.C. by the simple practice of leasing equipment from non-regulated carriers; (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of the lease agreement do not violate safety regulations in the operation of the leased equipment; and (3) to provide shippers and other members of the public with financially responsible carriers. We hold that these goals are not undermined by enforcing the indemnification provision in this case. Indiana has already paid the shipper for the lost cargo; the leased equipment was given a safety inspection before the trip; and the driver furnished by the lessor operated the leased equipment in a safe manner.

Reversed and remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	No. 74-5-NE-CV
JAMES DALTON	:	

M E M O R A N D U M

The decision in this case is whether a trip lease indemnification clause may be enforced against the lessor of a truck and driver to recover damages incurred by the motor carrier lessee as a result of the driver's theft of the cargo. The court has diversity of citizenship jurisdiction of this matter under 28 U.S.C. §1322(a), and, since there is presented the interpretation of a federal regulation, jurisdiction is also proper under 28 U.S.C. §1441(b).

The essential facts are not in dispute. Indiana Refrigerator Lines, Inc. (Indiana), a certified common carrier, leased a tractor-trailer truck and driver from James Dalton, an exempt carrier of agricultural products, under a trip lease arrangement whereby Dalton contracted to transport a shipment of meat from East Peoria, Illinois, to Salisbury, Maryland. The lease was entered into by one of Dalton's drivers, a Charles Elmore, who stopped at Indiana's Illinois terminal, signed the lease as Dalton's authorized agent, and picked up the cargo. Instead of going to Maryland as instructed, Elmore stole the shipment of meat which resulted in Indiana's having to pay the cargo's consignor $32,399.64.

Indiana now seeks to recover its loss from Dalton under the following clause in their lease:

> "Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's Assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement."

Dalton asserts that this indemnification clause is against public policy and is therefore unenforceable. The court has concluded that Dalton's position is correct.

As stipulated by the parties, the lease between Indiana and Dalton is subject to ICC rules and regulations governing augmentation of an authorized carrier's vehicles by those of an exempt carrier. Congress, in 49 U.S.C. §304(e), authorized the Commission to make:

> "such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being [leased] the motor carriers [lessees] will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable laws and regulations,

> as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment. ***"

The regulations subsequently enacted by the ICC require, in part, that trip leases:

> "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ."

49 C.F.R. §1057.4(a)(4)

Indiana does not contest its duty to assume complete control of and responsibility for lease equipment nor that trip lease provisions whereby a regulated carrier undertakes to avoid liability to injured third persons would circumvent statutory and regulatory policy and thus be unenforceable. Rather, Indiana takes the position that, at least in the instant circumstances, ICC regulations do not prohibit a lessor and a lessee from deciding between themselves which party will ultimately bear the cost of damages to a third party. In essence, Indiana argues that the lease with Dalton complied with ICC regulations, that Indiana assumed control of the equipment and conducted inspections to insure its highway safety, and that Dalton's having to bear the cost of its employee-driver's dishonesty in no way offends public policy or is proscribed by ICC regulations.

The effect of indemnity clauses such as the one involved here has been considered in several recent cases. Two in particular are cited by the parties herein in support of their respective positions.

In Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972), the court held that a trip lease clause providing for indemnity by the lessor was consistent with ICC regulations and could therefore be a matter of negotiation between contracting trucking companies. Alford v. Major, 470 F.2d 132 (7th Cir. 1972), on the other hand, reached an opposite conclusion in holding that a trip lease indemnification clause obligating the lessor to indemnify the lessee for damages to cargo or third persons resulting from negligence of the lessor or his driver was unenforceable as against public policy. The rationale of Alford, and relied upon by defendant here, was that the indemnity clause would enable the lessee to circumvent the intent of ICC regulations, which was ". . .to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers." Id. at 135.

The Alford decision on this issue has been adopted elsewhere, Carolina Freight Carriers Corp. v. Pitt County Transp. Co., 358 F.Supp. 1177 (E.D. Va. 1973); Denver Midwest M.Frgt., Inc. v. Busboom Truck, Inc. 207 N.W.2d 368 (1973), and the general view that authorized carriers must expect to bear the ultimate responsibility under trip lease arrangements may be found in numerous other cases. See e.g., Simmons v. King, 478 F.2d

857 (5th Cir. 1973); Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 280 F.2d 473 (3rd Cir. 1961); Cosmopolitan Mutual Insurance Company v. White, 336 F.Supp. 92 (D.Del. 1972).

It is relevant to note that the above authorities involve, for the most part, situations in which lessee indemnification was sought to recover damages paid by the lessee to third persons for personal injury or death resulting from a borrowed driver's negligence. In such cases, public policy considerations are drawn more sharply in focus than in the instant case, perhaps, since a principal goal behind ICC regulations is highway safety. Indiana argues that the cargo theft by Dalton's driver in no way involves highway safety and therefore the indemnity sought to be enforced does not serve to subvert the public policy underlying ICC regulations, and further, that this is particularly so when, as it has here, the lessee carrier has satisfied the shipper's claim for damages.

However, in the court's opinion the effect of ICC regulations and the public interests sought to be served thereby are far more extensive than what has been proposed by plaintiff in this case. From the regulations themselves and the manner in which the regulatins have been interpreted in the cases cited supra, the court concludes that

Congress and the ICC intended for authorized carriers to bear the ultimate responsibility for personal injury and cargo loss[1] which occur during the course of trip lease transportation service. The reasons for strict regulation of the trip lease device have been frequently enunciated, and of paramount importance in the regulatory scheme has been:

> "'. . .to protect the industry from practices detrimental to the maintenance of sound transportation services. . .' and to assure safety of operation for vehicles and drivers. See American Trucking Associations v. United States, 344 U.S. 298, 310, 73 S.Ct. 307, 314, 97 L.Ed. 337 (1952)." Alford v. Major, supra, at 134.

To promote the goals of highway safety and overall health of the national transportation system, authorized carriers must assume complete control of and responsibility for not only leased equipment but also borrowed drivers, who may be considered statutory employees of the carrier while engaged in performing the carrier's activities. Simmons v. King, supra, at 867;

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[1]The ICC's intent to regulate not only trucks on the highway but also matters relating to cargo and the financial responsibility of regulated carriers is reflected in 49 C.F.R. §1043 wherein the ICC reserves the right to define and approve acceptable indemnity arrangements between carriers and insurance companies.

Cosmopolitan Mutual Insurance Company v. White, supra, at 98. Under this pervasive regulatory policy the burden of driver dishonesty as well as driver negligence falls upon the regulated carrier; in either situation attempts to shift this burden to exempt carrier lessors acts to dilute what this court finds to be the goal of ICC regulation in this area--the certified carrier's complete control, supervision, and responsibility over truck and driver during the course of trip lease shipments. "If indemnity clauses in these circumstances are unenforceable, uncertainty is removed, statutory and regulatory provisions are fully enforced, and public policy is best served." Denver Midwest M.Frgt., Inc. v. Busboom Truck, Inc., supra, at 371.

It may be true as suggested by Indiana that this result will severely affect the willingness of authorized carriers to make use of trip leased vehicles. But if indemnification as sought here is consistent with the public's interest in transportation services, that determination rests with Congress or the ICC.

Indiana further seeks recovery on the ground that Dalton was negligent in failing to conduct a background investigation into the honesty of its driver, Charles Elmore. However, assuming Dalton's duty to make such inquiry[2], Indiana has failed

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[2]Given Elmore's status as a statutory employee of Indiana, the extent of this obligation is open to question.

to show any discoverable aspect of Elmore's past to cast doubt on his trustworthiness. Indiana is therefore not entitled to recover on a theory of negligence since it has shown no proximate relationship between Dalton's omission and the resulting theft.

For the reasons set forth above, the action against James Dalton must be dismissed. An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Supreme Court U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,
Petitioner

vs.

INDIANA REFRIGERATOR LINES, INC.
Respondent

BRIEF OF RESPONDENT INDIANA REFRIGERATOR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ISSUE PRESENTED

WHETHER AN INDEMNITY PROVISION IN A TRIP-LEASE AGREEMENT, BY WHICH A SUPPLIER OF EQUIPMENT AND DRIVER AGREE TO INDEMNIFY AN INTERSTATE MOTOR VEHICLE CARRIER, IS UNENFORCEABLE AS AGAINST PUBLIC POLICY ESTABLISHED BY 49 U.S.C. §304(e) AND 49 C.F.R. §1057.4(a)(4).

JURISDICTION

THE PETITION OF JAMES DALTON ADEQUATELY PRESENTS THE GROUNDS FOR JURISDICTION ON THIS ISSUE.

STATEMENT OF THE CASE

THE PETITION OF JAMES DALTON ADEQUATELY STATES THE CASE FOR PURPOSES OF A DETERMINATION ON WHETHER OR NOT TO GRANT A PETITION FOR CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,

Petitioner,

vs.

INDIANA REFRIGERATOR LINES, INC.,

Respondent

BRIEF OF RESPONDENT, INDIANA REFRIGERATOR LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Indiana Refrigerator Lines, Inc., respectfully states that the Petition for a Writ of Certiorari, filed by James Dalton, should be denied.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS BELOW ACCORDS WITH SETTLED PRACTICE IN CASES WHERE AVOIDANCE OF A CONTRACTUAL OBLIGATION IS SOUGHT ON GROUNDS OF FEDERAL REGULATORY POLICY.

This case involves an attempt by a trip-lessor of a motor vehicle (Petitioner) to avoid a contractual obligation to indemnify the trip-lessee (Respondent), a carrier certificated by the Interstate Commerce Commission, for a cargo loss occurring during the performance of the trip-lease. The basis on which the contractual obligation is sought to be avoided by Petitioner is a public policy defense derived from an I.C.C. regulation, 49 C.F.R. §1057.4(a)(4). The I.C.C. regulation does not, in terms, expressly prohibit indemnification of lessees by lessors for cargo losses. The defense to the contractual obligation contended for by Petitioner is therefore a "public policy defense" drawn from general regulatory goals. The contract sought to be avoided is not an "illegal bargain" in any strict sense of the term. C.f., Restatement, Contracts

§512, Comment c.

The public policy defense is one which the courts disfavor, Steele v. Drummond, 275 U.S. 199 (1927), particularly where there is no inequality of bargaining power and the contract sought to be avoided is one freely entered into. Baltimore and Ohio Southwestern Railway Co. v. Voigt, 176 U.S. 498 (1900).

The general rule is that where avoidance of a contractual obligation is sought on grounds of public policy, the public policy must be articulated clearly and of great weight. Twin City Pipeline Co. v. Harding Glass Co., 283 U.S. 353 (1931). It must be derived from authoritative expressions of the sovereign, and not from the predilections of the individual judge. Muschany v. United States, 324 U.S. 49, 64 (1945); Twin City Pipeline Co., supra. Finally, it must be shown that avoidance of the contractual obligation promotes a principle or an interest of general public concern, and not a mere private benefit. Beasley v. Texas and Pacific Railway Co., 191 U.S. 492 (1903).

Where the public policy urged is one to be derived from a complex regulatory scheme, the Courts are particularly cautious in avoiding contractual obligations on that ground. Mr. Justice Harlan's opinion in Southwestern Sugar and Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) suggests the considerations pertinent to evaluation of a public policy defense to an otherwise valid contract, in a regulatory context. That case involved a claim by a shipper against a regulated water carrier for a cargo loss. The carrier defended in part on the basis of an exculpatory clause in a published tariff filed with the I.C.C. In sustaining the conclusion of the Fifth Circuit that the clause should not be struck down as a matter of law, Justice Harlan states, at 360 U.S. 411, 421:

> 'Cases are not decided nor the law appropriately understood, apart from an informed and particularized insight into the factual controversy under litigation.' Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498, 78 S.Ct. 851, 2 L.Ed.2d 926, 938 (1958). This principle has particular force when the courts are asked to strike down on grounds of public policy a contractual arrangement on its face consensual.

Where the I.C.C. has not brought its informed insight to bear on the problem at issue, the federal courts have invariably refused to create an inflexible rule of broad applicability for the complex reality of interstate transportation.

The very silence of the I.C.C. on the question raised by Petitioner militates against acceptance of jurisdiction to review this case. The Sixth Circuit in effect has said that given the lack of explicit and detailed guidance from the I.C.C., it will not presume that the normal common-law rules for apportioning responsibility for loss--both contract and tort--should be abandoned. Its decision says only that indemnification in the case at bar is not as a matter of law prohibited. The position of the Sixth Circuit is a perfectly sensible position given the settled policy of judicial deference to administration expertise, where the deference will avoid interference with the regulatory scheme. It is especially appropriate in an I.C.C. context, where the practice of Congress has been to codify and/or lease intact common law rules governing the

relationship between carrier and shipper.

As Respondent suggests below, the policies of Congress and the I.C.C. toward the use of leasing devices in the area of agricultural transport are extremely complex. This Court is ill-equipped to marshall the intricate facts and to make the informed economic and regulatory judgments required for correct resolution of the issues presented. It should not ignore the counsel of caution and reticence of Mr. Justice Harlan in the River Terminals case, supra, and should let stand the decision of the Sixth Circuit in this case.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE CORRECTLY IMPLEMENTS THE POLICIES OF CONGRESS AND THE INTERSTATE COMMERCE COMMISSION TOWARD AGRICULTURAL TRANSPORT AND THE ROLE OF LEASING PRACTICES IN AGRICULTURAL TRANSPORT.

1. Analysis of Ex Parte No. MC-43, Lease and Interchange of Vehicles, and Congressional Response Thereto.

The regulation from which the public policy urged by Petitioner is drawn was originally promul-

gated by the I.C.C. in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951). In that proceeding, the I.C.C. sought to control the use of non-owned equipment by regulated motor carriers.

The I.C.C. was concerned with three substantive ills when it promulgated its regulations in Ex Parte No. MC-43:

(1) Unlawful delegation of operating authority by licensed carriers to unlicensed carriers, subversive of the Motor Carrier Act certification scheme;

(2) Circumvention of safety regulations, resulting in unsafe vehicles and exhausted drivers being on the road;

(3) Loose, informal arrangements, whereby shippers and the public having claims against a licensed carrier would have great difficulty establishing primary liability for injuries suffered.

The effect of the regulations was, among other things, to abolish trip-leasing, on the basis that that particular use of non-owned vehicles was particularly likely to contribute to these ills. The Supreme Court, recognizing this effect of the regulations, held that the I.C.C. had power under the

Motor Carrier Act to accomplish that result. American Transport Association v. United States, 344 U.S. 298 (1951). Congress then amended the Motor Carrier Act by adding sections 204(e) and 204(f), 49 U.S.C. §§304(e), 304(f), which were intended to preserve the practice of trip-leasing between exempt haulers of agricultural commodities like Petitioner Dalton and certificated carriers. The intent of Congress to preserve the practice is clear:

> If trip-leasing were abolished, truck haulers of agricultural commodities, livestock, and fish, who now obtain return hauls by leasing their trucks to authorized motor carriers, would no longer be able to do so, but would have to charge more for hauling such products, thereby necessitating an increase in the cost of marketing and the spread between farm and consumer prices. The economic loss involved in such wasteful use of equipment, manpower, and gasoline would be reflected in higher prices to consumers, or lower prices to farmers and other producers, or both. It is doubtful, indeed, whether the exempt haulers of agricultural commodities, livestock, and fish would be able to survive under these conditions.

H.R. Rep. 2425, 84th Cong., 2d Sess. (1956); 1956 U.S. Code Cong. and Admin, News, 4307. The determination of Congress to preserve trip-leasing between exempt and certificated carriers is reflected in the

present language of the regulations. See, 49 C.F.R. §1057.4(a)(3)(Appendix, p. 3a ff.)

The Congressional mandate to preserve trip-leasing requires accommodation between potentially conflicting regulatory goods--preservation of the economic viability of the agricultural transport sector exempted from regulation by 49 U.S.C. §303(b) on the one hand; on the other hand, promotion of highway safety and providing injured shippers and other members of the public with financially responsible defendants. The I.C.C. is best equipped to perform the detailed task of accommodation, not this Court. If this Court were to grant a writ of certiorari in this case, it would have to decide whether an inflexible rule insulating the lessor-exempt carrier from liability to a shipper for a cargo loss is good or bad regulatory policy. It would have to make this decision without guidance from other court cases (see below, pp. 13-22) and without guidance from the I.C.C., which has never explicitly considered the question. The Seventh Circuit is probably over-confident when it badly

asserts in Wear v. Brada-Miller Freight Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974), Petition for Certiorari granted, 43 U.S.L.W. 3493 (No. 74-54), that:

> . . . (W)e interpreted the regulations as requiring the party who has the duty of responsibility and control under 49 U.S.C. §304(e) to internalize the cost of any breach of this duty. (p. 7)

Its assertion is without question overly broad and inapplicable to the specialized situation prevailing in the agricultural transport sector.

2. Analysis of the Present Language of 49 U.S.C. §§304(e) and 304(f) and of 49 C.F.R. §1047.4(a)(4).

Petitioner attempts to gloss over the difficulty of the regulatory judgment he seeks from this Court by making references to the "clear meaning" of the language of 49 C.F.R. 1057.4(a)(4). Neither the language of the regulation nor the language of 49 U.S.C. §304(e) supports Petitioner's position that enforcement of an indemnification clause in this case necessarily undermines regulatory policy.

Petitioner argues that enforcement of indemnification between the parties to a trip-lease is con-

trary to the language of §304(e) to the effect that the certificated carrier (lessee) ". . . will be fully responsible for the operation (of the leased vehicle) in accordance with applicable law and regulations as if they were the owner of such vehicles." The language "in accordance with applicable law and regulations" must be interpreted in light of settled practice construing the language of the Interstate Commerce Act as leaving intact or codifying common-law rules of substantive liability governing the common carrier relationship. Secretary of Agriculture v. United States, 350 U.S. 162 (1956); Missouri Pacific Railroad Co. v. Elmore and Stahl, 377 U.S. 194 (1964). Adams Export Co. v. Croninger, 266 U.S. 491 (1913).

Petitioner contends that the statute renders indemnification illegal per se in the circumstances of this case. However, indemnification for cargo loss between "initial" and "connecting" carriers is not per se illegal at common law, or under the Interstate Commerce Act. C.f., Scott Truck Lines, Inc. v. Chicago, Rock Island, and Pacific Railroad

Co., 312 F.Supp. 511 (N.D. Ill. 1970); 49 U.S.C. §§20(11) (1970), (The "Carmack Amendments").

Petitioner also asserts that indemnification is prohibited by language in 49 C.F.R. 1057.4(a)(4) requiring the lessee to assume "exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto . . . ." This language is in fact irrelevant to this case, because--unlike the Fifth and Seventh Circuit cases--this case does not involve a loss resulting from operation of the equipment, an accident, etc. This case involves a theft of the cargo by Petitioner's employee. If the regulations of the I.C.C. required Petitioner's employee to be considered for all purposes as the employee of Respondent, the question would be closer.

The I.C.C. does not so require, and in Ex Parte No. MC-43 explicitly rejected a proposal which would have had that effect. Compare, Rule II(g) proposed by the Hearing Examiner in Ex Parte No. MC-43, 52 M.C.C. 675, 734, with the rule adopted by the I.C.C. Rule 207.4(e), 52 M.C.C. 675,.747, 49 C.F.R.

1057.4(e).

The "clear language" of the statute and regulations do not give the Court any guidance in making the regulatory judgments required for proper disposition of this case.

3. The Intent of Congress and the I.C.C. To Tolerate Trip-Leasing between Exempt and Certified Carriers would be Frustrated by a Decision in this case Contrary to that of the Sixth Circuit.

Petitioner argues, in support of his assertion that regulatory policy is undermined by the decision of the Sixth Circuit, that as a result of that decision exempt haulers will be required to carry cargo insurance, and that this will cause their costs to rise. (Petition, p. 13). As a matter of fact, exempt haulers do carry cargo insurance; Petitioner's speculation is without foundation in reality. The proper question--on which the informed judgment of I.C.C. is lacking at the present time--is whether the insulation from liability, which a blanket rule denying indemnification would entail, would reduce the incentive of exempt haulers to exercise care in the performance of trip-leased carriage. If the

incentive to use care is reduced, certificated carriers like Respondent will be unwilling to entrust exempt carriers with high-risk lading, like the meat involved in this case, and will be unwilling to permit exempt carriers to trip-lease their backhauls. Such a result runs counter to Congressional policy attempting to preserve the viability of the agricultural exemption by tolerating the practice of trip-leasing.

C. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL OR STATE COURTS.

In Part 2 of his Petition, Dalton contends that the decision in this case conflicts with decisions in the Seventh Circuit holding indemnification clauses in trip-leases unenforceable. Alford v. Major, 470 F.2d 132 (1972) and Wear v. Brada-Miller Freight Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974). Petitioner notes that the Sixth Circuit in Jones Trucklines, Inc. v. Ryder Truck Lines, 407 F.2d 100 (6th Cir. 1975); Indiana Insurance Co. v. Parr Trucking Service, Inc., 510

F.2d 715 (6th Cir. 1975), the Fourth Circuit in Carolina Freight Carriers Corp. v. Pitt County Transport Co., 492 F. 243 (1974) and the Fifth Circuit in Allstate Insurance Company v. Alterman Transport Lines, 465 F.2d 710 (1972) have also enforced indemnification provisions.

Respondent contends that the instant case differs in two crucial respects from the Fourth, Sixth and Seventh Circuit cases cited by Petitioner. First, this case is the only one decided by a federal court of appeals or a state appellate court involving the special policies applicable to trip-leases between an exempt agricultural hauler and a certificated carrier. Second, this is the only case decided by a federal court of appeals where the loss for which indemnification is sought is a cargo loss. As rehearsed below, at pages 17-18, the rule making Respondent primarily liable to the shipper for this sort of loss is created by statute, and the leasing regulations are irrelevant as a source for that rule.

1) The policies of Congress and the I.C.C. in the respective areas of agricultural transport and lease and interchange of vehicles have been balanced so as to permit the practice of trip-leasing between exempt haulers of agricultural commodities and certificated carriers. This policy decision was based on the specialized economy of agricultural transport.

This case, unlike any of the federal cases cited by Petitioner for the proposition that a conflict exists among state and federal appellate courts, does fall in the complex area of agricultural transport and the particularized policy matrix devised by Congress and the I.C.C. for agricultural transport. Irrespective of result, the considerations of policy considered to be determinative in the Fourth, Fifth, Seventh and other Sixth Circuit cases and in the state court cases cited by Petitioners are not applicable to this case. There is no conflict between the decision in this case and the Seventh Circuit cases, because the regulatory policies perceived

by Seventh Circuit--whether correctly or not--are wholly inapplicable in the specific regulatory context within which this case arises.

In Alford v. Major, the Seventh Circuit was faced with an interchange of vehicles between two certificated carriers. The effect of the use by the certificated carrier of the non-owned equipment was to permit the owner of the equipment--who was also certificated--to operate the equipment outside the limits of the owner's operating authority. Alford did not involve an exempt carrier whose economy--in order to remain viable--requires the ability to utilize the operating authority of others.

The facts of Alford disclosed that the delegation-of-operating-authority problem (see above, p. 5) was directly implicated by the specific use of non-owned vehicles in that case. The Seventh Circuit could have believed that the vehicle owner was using the interchange arrangement to unlawfully enlarge the scope of its authority granted by the I.C.C., and that conversely the lessee was using

non-owned equipment to provide the service which it had represented to the I.C.C. it was ready and able to perform as a condition of its permit. The Seventh Circuit could then have reasoned that in order to deter unlawful delegations of operating authority, it should devise from the language of Regulation 49 C.F.R. §1057.4(a)(4) a black-letter rule of civil liability for damages inflicted in the course of an unlawful delegation of operating authority. C.f., Wear v. Brada-Miller Systems, Inc., supra. In Wear, the Seventh Circuit rejected an attempt to distinguish Alford on its facts. The hostility to leasing practices evident in Wear runs directly counter to Congressional tolerance of leasing in the agricultural transport area; however, the Seventh Circuit was not presented with a case involving agricultural transport.

The rationale for the decisions in Alford and Wear does directly conflict with the approach of the Fifth Circuit in Alterman Trucklines, Inc., above, and Simmons v. King, 478 F.2d 857 (5th Cir.

1973), followed by the Sixth and Fourth Circuits. In those cases, the Fifth Circuit utilized State common-law principles of contract and tort liability to apportion liability between lessor and lessee for personal injury caused by the negligence of the lessor's employee.

Thus in Alterman the indemnification clause was enforced according to its terms, no negligence attributable to the lessee appearing. In Simmons, the case was remanded for factual determinations of the common-law elements of vicarious liability for the tort of a servant.

The question along which the Fifth and Seventh Circuits divide can be stated as follows:

> Does the I.C.C. policy derogating the practice of trip-leasing necessarily prohibit the use of contractual devices to allocate liability for damage between owner and lessee of a motor vehicle?

The Seventh Circuit answers this question "yes," in Alford and Wear, supra. The Fifth Circuit in Simmons and Alterman, the Fourth Circuit in Pitt County, and the Sixth Circuit in Jones Trucklines, Inc. v. Ryder Truck Lines, 507 F.2d 100 (6th Cir.

1975) and Indiana Insurance Co. v. Parr Trucking Service, Inc., 510 F.2d 490 (6th Cir. 1975), answer this question "no."

However, the instant case arises in a completely different regulatory context from those cases. The decisions of the Seventh Circuit in Alford and Wear v. Brada-Miller Systems, Inc., seems predicated solely on a perception of regulatory hostility to the practice of trip-leasing. The policy of Congress and the I.C.C. is to encourage, not limit or derogate, the use of trip-leasing between exempt haulers and certificated carriers, which is the situation in the instant case. The common question posed in the Fifth and Seventh Circuit cases, answers to which conflict, is not raised in the instant case because of the specialized policy expressly articulated by Congress and the I.C.C. for agricultural transport. The decision in this case does not and cannot conflict with the appellate decisions cited by the Petitioner because the policy question asked and answered in those cases is not

at issue in this case. C.f., S.S. Monrose v. Carbon Black Export, 359 U.S. 180 (1959). Certiorari predicated on the ground of conflict between the circuits over regulatory policy should be denied in this case. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923).

The state court cases cited by Petitioner for the proposition that a conflict exists among appellate courts present a slightly different issue concerning the jurisdiction of this Court. To the extent that they purport to interpret federal policy and rely on the perceived hostility to trip-leasing of Alford v. Major, they are wrong (Part B above); they are of no particular authority and they do not in fact conflict with the decision in this case for the reasons set out immediately above. For these reasons, the asserted conflict between the decision of the Sixth Circuit in the instant case and the decisions of the Supreme Court of Nebraska in Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc., 190 Neb. 231, 207 N.W.2d 368 (1973) and the New Jersey court in Gordon

Leasing v. Navajo Freight Lines, 130 N.J. Super. 290, 326 A.2d 14 (1973) does not in fact exist, and should not be the basis on which certiorari is granted.

2. The federal cases cited by Petitioner all involve indemnification for losses paid to a personal injury victim. Prior to the adoption of the leasing regulations in Ex Parte No. MC-43, the courts had utilized the Motor Carrier Act to create a new common law rule of vicarious liability, in order to ensure that the accident victim would be compensated. C.f., Costello v. Smith, 179 F.2d 715 (2d Cir. 1949), opinion of Learned Hand. Protection of the shipper does not require this judicial inventiveness, inasmuch as he is protected by 49 U.S.C. §319, and 49 U.S.C. §20(11) which render the carrier issuing the bill of lading primarily liable to the shipper. Respondent, recognizing that its primary liability to the shipper for cargo loss was clear as a matter of statute, paid the shipper promptly before seeking indemnification. The policy concerns expressed

by the Seventh Circuit in Alford and Brada-Miller to afford an accident victim redress, are addressed to a different sort of loss, on which Congress has not specifically acted. Congress has made the initiating carrier primarily liable for cargo loss; but, Congress has not stated or implied that, where two or more carriers participate in performing the transportation service, they may in no event apportion liability by contract between themselves. The policy with respect to allocation of liability for cargo loss is to ensure that incentive remains for all participating carriers to use reasonable care in providing the transportation service.

There is thus no conflict between the decision in this case and the Seventh Circuit decisions because the nature of the losses at issue in the respective cases differ in ways Congress has recognized and acted on. Certiorari should be denied.

D. THE "OTHER ISSUES" RAISED BY PETITIONER ARE NOT CLEARLY RAISED BY THE RECORD IN THIS CASE, AND ARE NOT SUBSTANTIAL.

The second issue purportedly presented by the application for certiorari is stated as:

> Whether such indemnity agreement is too vague and ambiguous to apply to the facts of this case.

This issue concerning the contract law of Tennessee was not raised by Respondent in its appeal to the Sixth Circuit from the decision of the U.S. District Court for the Middle District of Tennessee. It was not raised below in the form presented by Petitioner to this Court. Petitioner raised this issue below apparently as an alternative ground for affirmance.

Respondent, Appellant below, took the position at oral argument that any issue of contract interpretation had been resolved by the District Court in favor of Appellant, and, not being presented by a cross appeal, the issue was not properly before the Sixth Circuit. Alternatively, Respondent argued that there was insufficient facts in the trial court record to support the

contract construction contended for by Petitioner as an alternative ground for affirmance, and that the Sixth Circuit, if it were of a mind to consider the issue, should remand for further findings by the trial court. The Sixth Circuit did not consider the question in its order reversing and remanding to the trial court. (Petition; Appendix, p. 1a ff.)

Judge Morton, for the Middle District of Tennessee, effectively resolved the issue adversely to Petitioner in his order of July 18, 1975, granting Respondent a judgment. (Appendix, p. 7a) This order has not been appealed by Petitioner. In brief, the record in this issue does not have the clarity and focus required for consideration by the U. S. Supreme Court. Indeed, on the present record, there is probably no jurisdiction in this Court to consider the question.

This issue is addressed in Section II, F of Petitioner's Brief, pp. 21-22. There, Petitioner makes various assertions about state contract law.

Whether those assertions are correct or not, questions of that nature in a diversity case do not have the general significance required of U.S. Supreme Court cases. Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1938). "(This Court does not) sit for the benefit of the particular litigants. . . . (citations omitted) . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 74 (1955), opinion of Frankfurter, J. A question of Tennessee contract law--imperfectly litigated in the trial court not considered by the Court of Appeals below, and resolved against the Petitioner on remand--does not provide a basis for a grant of certiorari by the U.S. Supreme Court.

CONCLUSION

Petitioner's assertion that regulatory policy is undermined by the decision of the Sixth Circuit below is unfounded. Petitioner seeks to have this Court inject itself into a complex regulatory

scheme without guidance from the I.C.C. and without a detailed factual record. Petitioner requests this Court to create a black-letter rule of law based solely on the laconic words of an I.C.C. regulation, which has the potential for a wide-ranging disruption of motor carrier regulation. The Court should refuse to review the complex questions sought to be presented in this case.

Petitioner's assertion that the decision in this case conflicts with the decisions of the Seventh Circuit is also unfounded. Regulatory policy in the area of agricultural transport differs from the policy applicable to other types of motor carriage. Established law governing liability for cargo loss differs from the law governing and policies toward liability for personal injuries resulting from a traffic accident. There is no conflict between the decision in this case and the decisions of the Seventh Circuit.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed by James Dalton should be denied.

Respectfully Submitted,

FELSON BOWMAN

APPENDIX

49 U.S.C. §304(e) and (f):

(e) Regulations governing use of vehicles owned by others.

Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo

insurance covering all such equipment.

(f) Exceptions to regulations for use of vehicles owned by others.

Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use--

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a)(17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b)(6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

§1057.4 Augmenting Equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:

. . . .

. . . .

(3) Minimum duration of 30 days when operated by lessor. Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) Equipment used in agricultural or perishable operations. That subject to the proviso in (c) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(a) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203 (b) (4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the Act and is used regularly in the transportation of property of a character embraced within section

203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(b) Where the motor vehicle so to be used is one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(c) Provided, In either instance that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

. . . .

. . . .

(4) Exclusive possession and responsibilities. Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsi-

bility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) Lessee may be considered as owner. Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

. . . .

(5) Compensation to be specified. Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) Duration to be specific. Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) Copies of lease and their distribution; copy to be carried on vehicle. Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

* * *

(e) Driver of equipment to be in compliance with safety regulations. Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	No. 74-5-NE-CV
JAMES DALTON	:	

MEMORANDUM

On June 19, 1974, this court entered a Memorandum and Order holding that a trip lease indemnity clause could not be enforced against the lessor of a truck and driver to recover damages incurred by the motor carrier lessee as a result of the driver's theft of the cargo. This court was of the opinion that such a recovery would undermine the public policy expressed in 49 C.F.R. §1057.4(a)(4). The Sixth Circuit Court of Appeals reversed the holding of this court and the case was remanded for further proceedings. Indiana Refrigerator Lines, Inc. v. Dalton, No. 74-2197 (6th Cir., May 12, 1975). Essentially, the further proceedings are to determine the

effect of the indemnity agreement and the recovery, if any, under the agreement.

Indiana Refrigerator Lines, Inc. (Indiana), a certificated common carrier, leased a tractor trailer truck and a driver from James Dalton, an exempt carrier of agricultural products, under a trip lease arrangement whereby Dalton contracted to transport a cargo of meat from East Peoria, Illinois, to Salisbury, Maryland.

The lease was entered into by Charles Elmore, one of Dalton's drivers, who stopped in Indiana's terminals in East Peoria, Illinois, to Salisbury, Maryland.

The lease was entered into by Charles Elmore, one of Dalton's drivers, who stopped in Indiana's terminal in East Peoria, Illinois, and signed the agreement as Dalton's authorized agent. After picking up the cargo, Elmore acted in accordance with previous instruction from Dalton and in accordance with Dalton's general custom and practices and drove the leased vehicle from Illinois to Dalton's terminal in Tennessee for a

maintenance check. After Elmore left Dalton's Tennessee terminal en route to Salisbury, Maryland, he stopped in or near Chattanooga, Tennessee, and by virtue of an arrangement, permitted the cargo to be stolen. Elmore was subsequently convicted for his participation in the theft.

Indiana has paid the shipper for the lost cargo and now seeks to indemnify its loss under the following clause in their lease agreement with Dalton:

> Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement.

The lease also contained the following provision:

> Lessor hereby agrees . . . to indemnify carrier against any losses in connection with this operation.

The defendant advanced three theories to escape liability in this case. The first of these theories was that the indemnity agreement was void

as being contrary to public policy. As previously stated, this defense has now been put to rest. The second defense was that the driver of the vehicle, Elmore, was a "loaned servant" subject to the control and direction of Indiana, and as such, Indiana was responsible for his acts. As an incident to the "loaned servant" defense, Dalton contends that he would not be responsible for the driver's willful conversion of the cargo while the driver was so loaned. The third defense was that the lease agreement did not create a bailor-bailee relationship between Indiana and Dalton with reference to the cargo.

Dalton testified that the only agreement he had with Indiana was the written lease and that the obligations of the parties were contained within the four corners of the lease. He stated that he had no side agreements with any employee of Indiana. Dalton received copies of the contract, he read and understood it, and knew that it was in effect a form contract. The driver, Elmore, was under instruction from Dalton to

report by telephone every day while on the road. Elmore also acted pursuant to the established practice of Dalton when he drove from Indiana's facility in Illinois to Dalton's Tennessee terminal for a check of the truck. The routing through Tennessee constituted a 90% deviation from a straight run from Illinois to Maryland.

Dalton paid the driver, Elmore, by the mile. Also, Dalton furnished the fuel and paid for necessary state permits. Dalton received 78% of the tariff charged to the shipper by Indiana. Indiana did not select the driver and reserved only the right, which was not exercised, to require check calls from certain designated points. Indiana's connection with the driver was that it placed the merchandise on the truck at the point of embarkation and provided him, as agent for Dalton, with the proper bills of lading showing the destination and consignee thereon.

The court notes that the parties have not furnished any citation to Indiana law addressing the "loaned servant" rule. Instead, the parties

have argued this question on the basis of Tennessee law and general common law principles. The rule in Tennessee is that the loaned servant cotrine does not apply unless the original master resigns full control over the employee for the time in question. Chamberlain v. Lee, 148 Tenn. 637, 257 S.W. 415 (1924). In view of the control exercised by Dalton over the driver, some of the indicia thereof having been previously listed, the court concludes that the driver was not a loaned servant who became the employee of Indiana under the facts of this case. However, even if it is assumed that a loaned servant situation existed, there is no public policy with which the court is familiar that prevents the original master and the borrowing master from entering into an indemnification agreement covering the actions of the loaned servant. See: Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc., 507 F.2d 100 (6th Cir. 1974). Certainly, the language in the agreement is broad enough and clear enough to cover such a condition.

An examination of the lease agreement reflects that Dalton agreed to indemnify and hold Indiana harmless from any and all claims of whatever kind or nature which may arise under the agreement. Furthermore, Dalton agreed to indemnify Indiana against any lawsuits in connection with the operation. Keeping in mind the testimony of Dalton that there were no side agreements and that the lease contained the entire agreement, plus the fact that Indiana was seeking a result only (i.e., the transportation of a product from one point to another), and the control exercised by Dalton over his driver and his equipment, it seems clear that the parties intended that Indiana should be reimbursed for all losses which it sustained resulting from the operation and use of the equipment under this trip lease. There is no implication in this record that the indemnity agreement is unfair or unjust. The purpose which the parties intended to reach was that no loss would inure to Indiana by reason of the activities of Dalton or his employees. The specific wording

of the contract, even under a most narrow construction, would so mandate.

In view of the foregoing, the question of whether the agreement created a bailor-bailee relationship between Indiana and Dalton is not determinative of liability and the court concludes that it is not necessary to decide whether such a relationship was created. The indemnity agreement is valid and Dalton is liable thereunder.

With reference to the question of damages, the undisputed proof shows that Indiana notified Dalton immediately upon ascertaining that the cargo was lost and that Dalton was expected to assume liability for the loss. Indiana sent an agent to Chattanooga who, with some effort, located portions of the cargo in various retail stores in that city. A limited recovery was obtained through the agent's efforts; however, the major portion of the merchandise was never found. Thereafter, Indiana paid the shipper $32,399.64 to cover the lost cargo.

The expense of the agent traveling to

Chattanooga, Tennessee, to assist in the recovery of the merchandise was $300.00. The meat which was recovered was impounded by the local law enforcement officers to be used as evidence in a criminal trial. The meat was so retained from August of 1972 until February of 1973, when it was released as a result of actions taken by an attorney employed by Indiana. The attorney's fees amounted to $400.00. After recovery of the meat, it was necessary to transport it back to Illinois, trim it, rebox it, and attempt to resell it. The total cost of this procedure was $4,468.32. The total out of pocket expenses of Indiana was $34,567.96. The total received on the resale of the meat recovered was $9,131.09, making a net loss of $25,436.87.

The court finds as reasonable the expenses of the agent flying to Chattanooga, Tennessee, and assisting in the recovery of the meat. The court further finds the attorney's fee of $400.00 to be a reasonable expense in an effort to obtain release of the impounded meat. Both of these expenses were

in mitigation of damages. The court also finds that the expenditure of $1,468.32 in re-preparing the meat for sale was a reasonable expenditure in mitigation of damages. Therefore, the court finds that a judgment in favor of Indiana Refrigerator Lines, Inc. against James Dalton in the amount of $25,436.87 is reasonable and proper.

An appropriate order will be entered.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	NO. 74-5-NE-CV
JAMES DALTON	:	

ORDER

In accordance with the Memorandum contemporaneously filed, it is ORDERED that a judgment is

granted in favor of Indiana Refrigerator Lines, Inc. against James Dalton in the amount of $25,436.87.

UNITED STATES DISTRICT JUDGE